EXHIBIT J

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

BILL FANKHOUSER and TIM GODDARD, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	Case No. CIV-07-798-L
XTO ENERGY, INC. f/k/a CROSS TIMBERS OIL COMPANY, a Delaware Corporation ("XTO"),	)	
Defendant.	)	

O R D E R

This matter is before the court on Defendant's Motion for Order Directing Notice to Class and Barring Further Unauthorized Notice. The court held a hearing on the motion on July 19, 2010. Based on the parties' briefs and the arguments of counsel, the court makes the following ruling.

On April 13, 2010, the court issued an order decertifying the class and dismissing the class claims. Beer v. XTO Energy, Inc., Case No. CIV-07-798-L (W.D. Okla. Apr. 13, 2010) (Doc. No. 189). The order directed plaintiffs' attorneys to post a copy of the decertification order on the class website and to provide a notice prepared by the court to all members of the class within twenty days of the date of the order, or by May 3, 2010. On April 26, 2010, Bill Fankhouser and Tim Goddard filed a motion to intervene in this action as substitute class representatives.

Fankhouser and Goddard asked the court to stay distribution of notice to the class pending resolution of the motion to intervene and their corresponding motion to vacate the order dismissing the class claims. On May 3, 2010, Ed White on behalf of plaintiffs filed Plaintiffs' Emergency Motion to Stay Order Directing Distribution of Notice to Class. In the motion, plaintiffs argued

> it would be more efficient and less confusing to the class members to be provided one notice regarding the decertification and the outcome of the pending motions, particularly the motion to intervene, than to provide an incomplete first notice now, then potentially to provide other notice(s) later after rulings are issued on the pending motions. **It is in the best interests of the class to receive all relevant information in the most cogent manner, and a single notice is less likely to confuse the class.**

Plaintiffs' Emergency Motion to Stay Order Directing Distribution of Notice to Class at 2 (Doc. No. 196) (emphasis added). That same day, the court issued an order directing that "[n]otice to the Class shall be stayed pending the court's ruling on the Motion to Intervene (Doc. No. 191) and the Motion for Relief from Order of Decertification and Dismissal (Doc. No. 195)." Beer, order at 1 (W.D. Okla. May 3, 2010) (Doc. No. 197).

On July 2, 2010, defendant filed the motion at issue here. In the motion, defendant states that its counsel recently received a copy of a June 8, 2010 letter sent by Ed White addressed "TO FORMER CLASS MEMBERS OF THE BEER, et al. v. XTO ENERGY, INC., et al. CASE". The letter notified the recipient that the court "has decertified the class in the *Beer v. XTO* case" and that Ed White was

"encouraging former class members to execute representation agreements to give them the opportunity to prosecute their individual claims against XTO." Exhibit 2 to Defendant's Motion for Order Directing Notice to Class and Barring Further Unauthorized Notice (Doc. No. 216) [hereinafter cited as "White Letter"].

Defendant contends the White Letter is contrary to the court's order staying notice to the class of the decertifi cation order. In addition, it claims the letter is misleading because it does not notify class members that White was removed as class counsel due to inadequate representation. In its motion, defendant asks for the following relief:

(1) immediate release of the notice to the class that was attached to the decertification order;

(2) an order directing White to provide the court with a list of the class members to whom the White Letter was sent;[1]

(3) an order enjoining White from sending the White Letter or any other unapproved notice to any class members; and

(4) imposition of "such other sanctions , including but not limited to XTO's attorney fees to file this Motion,and restrictions as the Court deems just and proper." Defendant's Motion for Order Directing Notice to Class and Barring Further Unauthorized Notice at 4.

[1]On July 12, 2010, White sent the list to the court for in camera review.The list reflects that the White Letter was sent to 151 individuals.

In response to the motion, White argues that the White Letter is protected by the attorney-client privilege. White concedes that there is not a "classical attorney-client relationship" between class counsel and members of the class[2] and that once the decertification order was issued, there was no attorney-client relationship with the former class members. Plaintiffs' Response to Defendant's Motion for Order Directing Notice to Class and Barring Further Unauthorized Notice at 7-8. He nonetheless argues that to the extent an absent class member contacted him, an attorney-client relationship was formed and therefore transmittal of the White Letter constitutes a privileged attorney-client communication. The response does not, however, acknowledge that *plaintiffs* asked the court to stay notice of the decertification order, nor that the court ordered such notice be stayed pending the court's resolution of the motion to intervene.

Defendant counters that the White Letter is not a privileged communication because it is a soli citation letter seeking to create an attorney-client relationship. The court likewise questions whether the White Letter can be considered a privileged communication as White had been removed as counsel for the class, so there was clearly no attorney-client relationship between him and the absent class members at the time the letter was sent. Furthermore, the letter is a solicitation for

[2]This is an accurate statement of the law. "[C]ourts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members." In re Community Bank of N. Virginia, 418 F.3d 277, 313 (3d Cir. 2005). Rather, class counsel has a fiduciary duty to absent class members. Id.

clients, rather than correspondence with an existing client. Finally, there is no privileged communication in the letter. "To be protected by the attorney-client privilege, a communication between a lawyer and client must relate to legal advice or strategy." United States v. Johnston, 146 F.3d 785, 794 (10th Cir. 1998). Nothing in the White Letter appears relate to legal advice or strategy.[3]

Whether the letter is privileged or not, however, is not the issue; rather, the issue is whether the letter constitutes a misleading communication with the class that violates the spirit if not the letter of the order staying notice to the class. The court "has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981). Rule 23(d) gives the court the authority to craft notices provided to the class during the course of the litigation. Fed. R. Civ. P. 23(d)(1)(B). Courts have held this authority includes restricting communications to the class "to safeguard class members from 'unauthorized [and] misleading communications from the parties or their counsel.'" Community Bank, 418 F.3d at

[3]Judge Kaplan in the Southern District of New York said it best:

> With all due respect, letters to prospective clients to encourage their involvement in a class action and a proposed form of retainer agreement, regardless of whether the sending of them was in furtherance of the interests of existing clients, are not communications between attorney and client and are not confidential. They are, in significant measure, direct mail advertising.

Auscape Int'l v. Nat'l Geographic Soc., 2002 WL 31250727 at *1 (S.D.N.Y. 2002).

310 (*quoting* Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2d Cir. 1980)).

In Gulf Oil, the Supreme Court made it clear that:

> [A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing – identifying the potential abuses being addressed – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.
>
> > "[T]o the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the polices of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties."

Gulf Oil Co., 452 U.S. at 101-2 (footnotes and citations omitted).

Based on these standards, the court finds the White Letter constitutes an improper communication with the class for the following reasons. First, when it decertified the class, the court crafted the notice that it thought would best inform the class of the court's actions and the reasons for those actions. The court's notice was the sole approved notice with respect to decertification. The White Letter did

not include the court's approved notice; it therefore constitutes an unapproved communication with respect to the decertification order. Second, the unapproved nature of the White Letter is more apparentgiven the court's order staying notice to the class of the decertification order. Third, the White Letter's truncated statement that "the Judge has decertified the class" is incomplete and therefore misleading. The letter did not inform the class that the court ordered decertification, in part, because it found counsel was not adequately r epresenting the class. This is a material omission because the letter seeks to have the recipients retain White as their attorney. Fourth, the White Letter is incomplete because it did not inform the class that motions to intervene and to reconsider dismissal of the class claims were pending and that – should the court grant the motions – the class action would continue. This omission is material because the letter intimates that the class members' only recourse was to file individual actions against defendant. This suggestion is misleading because the court's decertification order clearly specified that the class claims were dismissed without prejudice "to refiling either by individual members of the class*or as a class action*" Order at 11 (emphasis added) (Doc. No. 189).

The court finds this unauthorized, unapproved communication with certain members of the class most likely confused them as to the status of the case and their options, particularly in light of the court's subsequent order granting the motions to intervene and to vacate dismissal of the clas s claims. Having found the White

Letter to be improper, the court must determine the appropriate remedy. Defendant and newly named plaintiffs request an order enjoining further communications between Ed White, Martin High, and their agents and the class members regarding the subject matter of this action. The court finds that request is contrary to the Supreme Court's admonition to craft restrictions as narrowly as possible so as not to infringe on First Amendment rights. *See* Gulf Oil Co., 452 U.S. at 102, 104. In addition, White indicates in his response that some of the people to whom the White Letter was sent had "indicated an interest in pursuing claims not related to the *Beer v. XTO* case." Response at 6. A blanket bar on communicating with class members could have a chilling effect on communications with respect to these claims.

As the misconduct found by the court was the sending of the White Letter, the court finds a narrow injunction on communications, together with a notice to the class, is sufficient to correct the abuse. The court therefore enjoins White, High, and their agents from (1) sending to the class any letter similar to the White Letter or (2) providing any other communication that would cause further confusion to class members as to the status of their claims in this action. At the hearing on the motion, new class counsel and counsel for defendant agreed on a notice to be sent to the class. Having reviewed the notice, the court approves it with the changes noted on the record during the hearing. New class counsel shall file a notice informing the

court when notice to the class has been disseminated. The printing and mailing costs of this notice shall be borne by White and High.[4]

In sum, Defendant's Motion for Order Directing Notice to Class and Barring Further Unauthorized Notice (Doc. No. 216) is GRANTED to the extent noted above.

It is so ordered this 20th day of July, 2010.

Tim Leonard

TIM LEONARD
United States District Judge

[4]At the hearing, White notified the court that he concurred that notice was necessary and that he and High should bear the cost of such notice. The court appreciates counsel's willingness to accept responsibility for the costs that will be incurred.